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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

RODAK, JR., CLERK

No. 77-1373

MAINE CENTRAL RAILROAD COMPANY, *Appellant*,
v.
RAYMOND L. HALPERIN, *et al.*, *Appellees*.

On Appeal From The Supreme Judicial
Court of Maine

**PETITIONER'S RESPONSE TO THE MEMORANDUM
OF THE UNITED STATES AS AMICUS CURIAE**

PETER J. NICKLES
EUGENE D. GULLAND
MARC B. TUCKER

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Of Counsel:

SCOTT W. SCULLY

General Counsel

MAINE CENTRAL RAILROAD
COMPANY
242 St. John Street
Portland, Maine 04102
(207) 773-4711

WILLIAM C. SMITH
JAMES G. GOOD

PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH &
LANCASTER
One Monument Square
Portland, Maine 04101
(207) 773-6411

*Attorneys for Maine Central
Railroad Company*

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The United States "disagrees with the Commission and concludes that the Maine tax is not preempted." (U.S. Mem., p. 8.) It bases this position on the fact that the Commission has not "adopted an explicit rule or regulation governing the application of state excise taxes." (*Id.* at 14.) There are two defects in the arguments of the United States. *First*, the Commission has made clear that a measure such as the Maine tax interferes with the federal IPD program. *Second*, the prior decisions of this Court do not establish the constitutional principle, for which the United States here contends, that state tax measures run afoul of the Supremacy Clause only when they conflict with a federal statute or regulation expressly forbidding the imposition of such a tax.

1. The United States fails to address the principal issues presented in the court below and in the jurisdictional statement. It ignores the critical point that the Court below refused to respect the Commission's interpretive rulings and policy statements, antedating this litigation, that IPD funds do not belong to their railroad recipients; that they are held in earmarked funds subject to restrictions in the nature of a trust; and that they become the property of a railroad only in the form of the boxcars that may be acquired with them if a number of conditions are met. (J.S. 17-19.)

Neither the United States nor the court below suggests that the restrictions that the Commission has imposed upon IPD funds are without substance. Neither faces up to the fact that the Maine tax is levied on funds that might never be used to increase the "value of the franchise," or that the Commission could order that they be surrendered. Different and more difficult questions would be presented if the tax were imposed *after* boxcars had been acquired with IPD funds, for the Commission's purpose of encouraging boxcar acquisitions would have been realized, there would be no conflict with stated Commission policies, and the application of the tax would accord with its conception as an impost upon actual increases in franchise value.¹

¹ Seizing on the fact that the Commission permits the use of IPD funds for payment of state and federal income taxes attributable to IPD income, the United States leaps to the unexplained and unjustified conclusion that the Commission's failure expressly to address excise taxes is an implied authorization of such taxes. (U.S. Mem., p. 10.) It is nothing of the sort. The United States ignores the Commission's refusal to permit IPD funds to be used for payment of the excise tax and the express statement of policy that it

The United States does not, and could not, dispute the uncontradicted evidence below—adduced chiefly by the Commission itself—that application of the Maine tax interfered with the Commission's target rate of return on boxcars; burdened general corporate funds that the Commission intended to shield from taxes attributable to IPD income and that must be used to satisfy quota requirements; and actually made it disadvantageous for petitioner to acquire additional boxcars that would earn additional IPD. (J.S. 19-23.)

Rather than defer to the Commission's expert judgments, the United States—like the court below—engages in its own analysis of the relative importance of component parts of the IPD program. Thus, the United States asserts that "the state tax does nothing to upset the relative investment priorities implicit in the Commission's program." (U.S. Mem., p. 21.) In fact, the reverse is true. The very rationale of the IPD program is that railroads will invest in boxcars

"did not envision or intend that [IPD] charges would result in added financial burdens on the corporate earnings and assets of creditor railroads." (R. 202; J.S. 19.) And as this Court has recently noted, "'where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved, pursuant to the policy of the statute,' States are not permitted to use their . . . power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, — U.S. — (No. 76-930, decided March 6, 1978), slip. op. at 24.

The Commission was justified in doubting its authority to shield IPD income from federal income taxes; having permitted payment of federal taxes out of IPD income, it could properly determine that comity warrants payment of state income taxes attributable to IPD receipts and that such state taxes should also be paid out of IPD funds. The Commission is free to make one such exception to the trust restrictions it imposes on the funds without eliminating all such restrictions.

if the investment is more attractive than non-transportation alternatives. (J.S. 20.) Since NROI and gross transportation receipts—the bases for computing the excise tax—can be earned only from railroad-related operations, application of the excise tax to IPD receipts discourages railroads from acquiring boxcars that will increase their IPD receipts. That is particularly likely to occur where IPD receipts cannot be used because of the railroad's inability to satisfy IPD quota requirements. Indeed, the one way open to petitioner to follow the suggestion of the court below and limit IPD receipts through "financial planning" is to stop acquiring boxcars. (J.S. 22.)

The United States contends that the excise tax diminishes the rate of return on all railroad investments in equal proportion (U.S. Mem., p. 21)—but ignores that railroads may place their money in non-transportation investments that are not subject to the tax. And the assertion that "the Maine tax is neutral with regard to federal purposes" (*id.*, at 11) overlooks that the Commission's intentions are not "neutral" with respect to railroad receipts of IPD funds.²

² The tension in the argument adopted by the United States appears clearly in its efforts to minimize the conflict between the Maine tax and the IPD program that both it and the court below could not ignore. Thus, the United States quotes the observation of the court below that "'the year 1974 was unusual' because of appellant's record earnings." (U.S. Mem., p. 13.) It asserts that "the record does not indicate that . . . such a situation is likely to result recurrently or in a substantial number of other cases with a disruptive effect on the IPD program." (*Id.*) The United States does not—and could not—cite any decision of this Court holding that the scale or frequency of conflict between state enactments and a federal program is a relevant factor in determining whether federal law shall prevail.

2. No decision of this Court establishes that the application of the Maine tax challenged here must fail because of the Commission's failure to "state expressly that IPD receipts must be disregarded for purposes of state excise tax computation." (*Id.*, at 10.) The United States defends this novel and potentially far-reaching doctrine—which it would have this Court adopt in a summary affirmance—with the argument that both Congress and federal agencies should be required to identify in express terms those specific state taxes they intend to prohibit. (*Id.*, at 9.)

It is surely open to serious doubt whether it is practical for Congress and the federal agencies to anticipate all the possible forms of state taxation that could interfere with federal objectives.³ And it is equally inadmissible to contend that federal programs must suffer some hindrance until Congress or an agency can discover and remove the interference. It is precisely such considerations that underlie the longstanding principle that the ultimate task of the courts is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (*see* J.S. 16 for numerous citations approving this formulation.) The courts do not confine their inquiry as narrowly as the United States would have it; they "consider the relationship between state and federal laws as they are interpreted and applied,

³ We believe that no other state imposes an excise tax upon IPD receipts.

not merely as they are written." *Id.*, at 526; see also *Savage v. Jones*, 225 U.S. 501, 533 (1912).⁴

The United States repeatedly characterizes this as a case of "implied preemption," a concept that is apparently meant to suggest that this Court typically adjudicates cases in which the conflict between state and federal policies is clear on the face of statutes and regulations. It hardly needs be said that such square conflicts are rare. More rarely still do they reach this Court. The proof of the point lies in the fact that, even in cases of the most sweeping preemption—where federal intent to preempt must perforce be the clearest—the Court has refused to hold that the intention to preempt must be stated expressly. The United States quotes dicta from a number of these cases,⁵ which involve situations in which "state regulation, although harmonious with federal

⁴ We agree with the Commission that *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 428-29 (1940), and *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965), confirm the error of the decision below. The weakness of the United States' efforts to distinguish the cases is reflected by the cryptic, off-handed and incorrect statement that "*McGoldrick* may have been called into question by *Department of Revenue v. Ass'n of Washington Stevedoring Companies*, No. 76-1706, decided April 26, 1978." Nor is *McGoldrick* a case of preemption appearing expressly on the face of the federal statute or regulation: the regulatory exemption applied only to imported oil "in bonded warehouses," but the Court read the exemption to apply to oil even after its removal from such warehouses.

Similarly, the attempt of the United States to cast off *Warren Trading Post* as involving "problems of inter-governmental tax immunity" rather than "ordinary preemption" (U.S. Mem., p. 14 n.9), does not withstand a reading of *Warren Trading Post*, which turns on standard preemption analysis.

⁵ *De Canas v. Bica*, 424 U.S. 351 (1976); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

regulation, must nevertheless be invalidated under the Supremacy Clause" because Congress has manifested an "intent to 'occupy the field.'" *De Canas v. Bica*, 424 U.S. 351, 356, 357 n.5 (1976). Federalism does not lightly permit the fencing off of entire areas in which the states are not free to legislate at all; in such cases there must be an unmistakable expression of intent to command "a complete ouster of state power—including state power to promulgate laws not in conflict with federal laws." *Id.*, at 357. If any class of cases would establish the rule for which the United States contends, the cases inferring preemption from comprehensive regulation would. They do not.⁶ Indeed, this Court has made clear in these cases that, "It has long been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 772 (1947); cited with approval in *Ray v. Atlantic Richfield*, *supra*.

This case, by contrast, does not foreclose an entire subject matter from state legislative powers. It does

⁶ It was in such a case of preemption by comprehensive regulation that the Court, in *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) wrote the dicta concerning state taxation powers upon which the United States so heavily relies. (U.S. Mem., p. 8.) Far from carving out any preferred place for state tax measures, it is plain in context that the Court meant to allay concerns that the states' power to tax could be broadly preempted by federal law in the same manner as the States' more limited power to deal with resident aliens. The Court therefore did not suggest that state tax statutes should be accorded more deference than any ordinary state measure. At the same time, the Court reaffirmed that the function of the courts "is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67.

not require a court to infer from general statements of policy by Congress or an agency whether the full measure of federal purposes and objectives is burdened by a state enactment. Here, the federal agency charged with shaping and implementing an important federal program has stated that the Maine tax conflicts with that program.

CONCLUSION

The views of the United States are based on a novel doctrine never adopted by this Court. The conflicting positions of the United States and the Commission underscore that the questions presented are substantial. The jurisdictional statement raises an additional substantial question that the United States does not address. Accordingly, the Court should note probable jurisdiction and set the case for argument on the merits.

Respectfully submitted,

PETER J. NICKLES
EUGENE D. GULLAND
MARC B. TUCKER

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Of Counsel:

SCOTT W. SCULLY

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PIERCE, ATWOOD, SCRIBNER,
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LANCASTER
One Monument Square
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(207) 773-6411

*Attorneys for Maine Central
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